Supreme Court, U.S.
FILED
NOV 25 1994
OFFICE OF THE CLERK

No. 94-780

In The

Supreme Court of the United States

October Term, 1994

CAPITOL SQUARE REVIEW AND ADVISORY BOARD, RONALD T. KELLER, DANIEL SHELLENBARGER, AND RICHARD H. FINAN,

Petitioners,

v.

VINCENT J. PINETTE, DONNIE A. CARR, AND KNIGHTS OF THE KU KLUX KLAN,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF IN OPPOSITION TO A WRIT OF CERTIORARI

BENSON A. WOLMAN
Counsel of Record
DAVID GOLDBERGER
3600 Olentangy River Road
Building 501
Columbus, Ohio 43214-3913
(614) 459-4140

Attorneys for Respondents

Of Counsel

KEVIN FRANCIS O'NEILL
American Civil Liberties Union
of Ohio Foundation
1223 West Sixth Street
Cleveland, Ohio 44113
(216) 781-8639

54 pp

QUESTION PRESENTED FOR REVIEW

Whether an injunction preventing public officials from discriminating against a display of a cross by the Ku Klux Klan on a public forum open to other political and religious symbols violates the Establishment Clause of the First Amendment?

TABLE OF CONTENTS

Page

QUESTION PRESENTED FOR REVIEW i

TABLE OF AUTHORITIES iii

OPINIONS BELOW 1

INTRODUCTION 2

STATEMENT OF THE CASE 3

REASONS FOR DENYING THE WRIT 10

I. THE COURT BELOW APPLIED WELL-SETTLED LAW IN HOLDING THAT THE KU KLUX KLAN IS ENTITLED TO ACCESS TO A PUBLIC FORUM TO EXPRESS UNPOPULAR POLITICAL AND RELIGIOUS VIEWS ON THE SAME BASIS AS OTHERS WITH MORE POPULAR VIEWS 10

II. THERE IS NO CONFLICT AMONG THE CIRCUITS REGARDING DISCRIMINATION AGAINST CONTROVERSIAL PUBLIC STATEMENTS WHICH COMBINE RELIGIOUS AND POLITICAL VIEWS 16

CONCLUSION 19

APPENDIX RA1

TABLE OF AUTHORITIES

Page

CASES

Board of Education of West Side Community Schools v. Mergens, 496 U.S. 226 (1990) 14

Carey v. Brown, 447 U.S. 455 (1980) 12

County of Allegheny v. Greater Pittsburgh ACLU, 492 U.S. 573 (1989) 13, 15, 17, 18

Fowler v. Rhode Island, 345 U.S. 67 (1953) 13

Hague v. CIO, 307 U.S. 496 (1939) 12

Kaplan v. City of Burlington, 891 F.2d 1024 (2d Cir. 1989), *cert. denied*, 496 U.S. 926 (1990) 16, 17, 18

Lamb's Chapel v. Center Moriches Union Free School District, 113 S.Ct. 2141 (1993) 14

Larson v. Valente, 456 U.S. 228 (1982) 13

Niemotko v. Maryland, 340 U.S. 268 (1951) 12

Pinette v. Capitol Square Review and Advisory Board, 844 F. Supp. 1182 (1993), *aff'd* 30 F.3d 676 (6th Cir. 1994) ..... *passim*

Pinette v. Capitol Square Review and Advisory Board (Case No. C2-93-1162, U.S.D.C. S.D. Ohio, Opinion and Order of January 4, 1994) 2, 4

Police Department of Chicago v. Mosley, 408 U.S. 92 (1972) 11, 12

Smith v. County of Albemarle, 895 F.2d 953 (4th Cir. 1990), *cert. denied* 111 S.Ct. 74 (1990) 16, 17

Texas v. Johnson, 491 U.S. 397 (1989) 12

Weinstein v. Bradford, 423 U.S. 147 (1975) 2

Widmar v. Vincent, 454 U.S. 263 (1981) 14, 18

TABLE OF AUTHORITIES – Continued

Page

CONSTITUTIONAL PROVISIONS

U.S. Const. amend. I. . . . . *passim*

U.S. Const. amend. XIV. 10, 11, 13

STATUTES AND REGULATIONS

Ohio Revised Code Section 123.022 5

Ohio Administrative Code Section 128-04-02(A) 4

Respondents respectfully urge the Court to deny the Writ of Certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this proceeding.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit is reported at 30 F.3d 676 (6th Cir. 1994) and is appended to the Petition for *Certiorari* at A1-A12.[1]

At the District Court level, the Court *sua sponte* divided its proceedings into two segments. An Opinion and Order was entered for each segment. Both shared a common nucleus of operative facts. The opinion directly resulting in the Petition for *Certiorari* is reported at 844 F. Supp. 1182 (S.D. Ohio 1993) and is appended to the Petition at A13-A26; the other opinion is unreported and is included in the Respondents' Appendix at RA1-RA10.[2]

---

[1] References to the Appendices contained in the Petition are identified herein as A1, A2, etc. References to the Respondents' Appendices contained in this Brief in Opposition are identified herein as RA1, RA2, etc.

[2] Respondents' Complaint and Amended Complaint raised two issues: one was related to erection of the Klan's cross near the menorah; the other was related to an issue of a denial of a permit to the Klan to hold a rally on Capitol Square in January 1994. Two hearings were set: one was primarily devoted to the cross issue, and the other was primarily devoted to the rally. References herein to the record include R. 9: TR I (record of hearing of December 20, 1993), and R. 23: TR II (record of the morning portion of the hearing of January 3, 1994) and R. 23: TR III (record of the hearing of the afternoon of January 3, 1994).

The Respondents do not challenge that the events herein are "capable of repetition, yet evading review." *Weinstein v. Bradford*, 423 U.S. 147, 149 (1975).[3]

INTRODUCTION

The primary issue in this case is whether the State[4] can bar from a quintessential public forum a Ku Klux Klan cross displayed to advocate the Klan's political and religious views when the State permits other political and religious displays. The State's petition attempts to recharacterize the issue as whether or not the Establishment Clause permits private groups to erect religious

---

The December 20 hearing focused on injunctive relief regarding the cross which the District Court granted on December 21, 1993. 844 F. Supp. at 1188. The January 3 hearing focused mainly on discriminatory treatment, injunctive relief related to the rally, and a claim for damages; the Court issued the injunction permitting the rally and denied damages. RA10, *Pinette v. Capitol Square Review and Advisory Board* (Case No. C2-93-1162, U.S.D.C. S.D. Ohio, Opinion and Order of January 4, 1994). The subject of the Petition before this Court is the injunction ordering the Petitioners to grant the permit to erect the Klan's cross; the State did not appeal the injunction ordering the State to grant a permit for the rally. The record of both hearings constitutes the record on appeal, together with a supplemental record from the District Court.

[3] Although not in the record, the Respondents have indicated through public statements in the press that if a menorah again is permitted in 1994, Respondents again will seek to erect their display.

[4] The word "State" is frequently used herein to refer to the Petitioners: the Capitol Square Review and Advisory Board, its executive director, its spokesperson, and its chairperson.

displays in front of government buildings. That issue, however, is not properly presented by this record, which indisputably shows that the State has voluntarily permitted other religious and secular entities to erect other religious symbols. In previous years a Chanukah menorah and a Christmas tree were erected in this same forum in which the Klan sought to erect its cross. Thus, the critical question in this case is whether the State can discriminate against particular religious symbols and particular political viewpoints. Both lower courts correctly recognized that such discrimination is unconstitutional. Those rulings are clearly consistent with prevailing law and do not merit this Court's plenary review.

STATEMENT OF THE CASE

Statement of Facts

The issue before the Court is the Respondents' access to the large park-like area, a block wide, on one side of the State capitol building in Columbus, Ohio.[5] Both the

[5] The public forum portion of Capitol Square at issue in the case at bar (there are additional fora on other sides of the Statehouse) measures 250 feet by 640 feet. Stipulation 12; this 156,000 square feet comprises over 3 1/2 acres. A view of the forum – from a somewhat different perspective than presented at A43 of the Petition – is included at RA31 and RA32, Plaintiffs' Supplemental Exhibits 105 and 106 (the originals of these two stipulated exhibits are in color). These and Supplemental Exhibits 101, 102, and 103 were stipulated by the parties and made part of the District Court record on March 22, 1994.

District Court, A17 (844 F. Supp. at 1183),[6] and the Court of Appeals, A6 (30 F.3d at 678), concluded that this area is a traditional public forum. Indeed, Petitioners do not dispute the public forum designation, and it is well established as a matter of state law: "Capitol . . . grounds are available for use by the public . . . for free discussion of public questions. . . . " Ohio Administrative Code Section 128-04-02(A). As the District Court further found, many unattended[7] displays have been permitted in the public forum. Most relevant for this case, for the past several years, the State of Ohio has erected a Christmas tree, and the Lubavitcher sect has displayed a large Chanukah menorah in Capitol Square. A14 (844 F. Supp. at 1183).

On October 29, 1993, the Klan applied for a permit to hold a demonstration in Capitol Square. RA1. On November 18, 1993, while this rally permit application was still under consideration, the Capitol Square Board voted *sua sponte* to bar display of both the State Christmas tree and the Lubavitch sect's menorah from Capitol Square during December 1993. A14 (844 F. Supp. at 1183). At the time, the Klan had not yet sought a permit to erect a cross in Capitol Square. Nevertheless, the Petitioners decided to

---

[6] In its opinion in the second segment of the proceeding, the District Court also said this was an "archetypal public forum" "from time immemorial." RA6 (*Pinette*, Opinion and Order of January 4, 1994).

[7] "Unattended" herein means that the given display has been permitted to remain up overnight without accompanying ongoing personnel or ceremonies. It is clear that as some unattended displays are set up, there are attendant ceremonies; see, for example, RA23 (Plaintiffs' Supplemental Exhibit 101, Governor's participation in dedication of menorah).

bar the Christmas tree and the menorah solely to foreclose any claim to equal access that the Klan might present. RA12 (Plaintiffs' Exhibit 33, Broadcast No. 5, Statements of Bill Cohen and Petitioner Finan).[8]

The decision of the State to bar the tree and menorah resulted in a great public uproar. A statement was released by the Office of the Governor. According to the statement, "People of this great State think that we ought to have a Christmas tree and think that we ought to have a menorah at the Statehouse and so do we. We've had a Christmas tree at the Statehouse for tens of years and you can't let a single group or groups of people dictate to the people of Ohio what they are and aren't going to do." RA14 (Plaintiffs' Exhibit 33, Broadcast No. 6, Statement of Mike Dawson, Press Secretary to the Governor.) Newspaper accounts described the Governor as "disappointed and upset." RA20 (Defendants' Exhibit D, *The Columbus Dispatch*). The Governor was also quoted as saying: "The Board's initial decision was a mistake. I trust this matter will be resolved quickly." *Id.*

Consistent with these public statements, the Governor and the other State officials who appoint the members of the Board,[9] signed and delivered to the Board a letter calling upon the Board to permit the tree and menorah. *Id.* The Board met in special session on November 23, 1993, declared its earlier vote invalid, and

---

[8] The Petitioners assumed that the Klan would seek to erect a cross near the menorah as a Klan group had done in Cincinnati. RA17 and RA22, Defendants' Exhibits C and D.

[9] Ohio Revised Code Section 123.022.

approved the displays of the Christmas tree and a menorah by a nine-to-zero vote. The reason for the change in vote was explained by Board Chairperson, and Petitioner herein, Richard Finan, "I've been in politics for twenty-one years. When you get a letter from the Governor, the Speaker, and the President of the Senate, you do respond," he said. RA16 (Plaintiffs' Exhibit 33, Broadcast No. 8).

The State Christmas tree was erected on December 7, 1993. A16 (844 F. Supp. at 1184). On November 29, 1993, Rabbi Chaim Capland applied, as in prior years, for a permit to erect a menorah on Capitol Square from December 8 through December 16, 1993. That permit was granted on November 29, 1993, the same day as the application was submitted. A15 (844 F. Supp. at 1183).

Also on November 29, shortly after learning from press reports that the State would be permitting the menorah but not the Klan cross,[10] the Klan applied for a permit to display their cross on the Capitol Square forum from December 8 through December 24, 1993. The Klan filed its application in order to establish its right of access to the Capitol Square public forum. Respondents' application was denied on December 3, 1993.

In an effort to resolve the differences between the parties, the Respondents sent a letter to the Petitioners explaining that accompanying the cross would be a disclaimer with a political message to the effect that "this cross was erected by private individuals without government support for the purpose of expressing respect for

---

[10] RA17-RA18, Defendants' Exhibit C.

the holiday season and to assert the right of all religious views to be expressed on an equal basis on public property." A15-A16 (844 F. Supp. at 1183-84).[11]

On December 15, 1993, Respondents filed the instant action in U.S. District Court in Columbus. A hearing to consider Respondents' request for injunctive relief was held on December 20, 1993. A13 (844 F. Supp. at 1183). During the hearing, undisputed evidence was presented showing that there is no policy against unattended displays being erected on the forum at Capitol Square. The evidence also showed that political speeches, gay rights demonstrations, anti-war demonstrations, demonstrations regarding various types of public issues were routinely allowed there, as well as booths and other displays erected during arts festivals, a united fund campaign "thermometer," the State Christmas tree, and the menorah. *Id.* (844 F. Supp. at 1183-84).

Respondent Donnie A. Carr testified that the reason the Klan had applied for its display was that he had heard that the State was not going to permit a tree or a menorah but that in the wake of public pressure, the State reversed itself and decided to permit just a tree and a menorah but not a Klan cross. Donnie Carr at TR I 42-44. Mr. Carr said that his political motivation for filing the request was that "since we were being excluded by the city or the state, the Capitol Square Review and Advisory Board, that we would attempt to obtain a permit to erect

---

[11] Counsel for the Klan also invited State suggestions concerning the disclaimer. *Id.*

a cross for the Christmas season." *Id.* Mr. Carr also testified that while the cross has a religious connotation to the Klan, it also has other applications: "To us, it is a sacred symbol, but it is also a symbol of going against tyranny, a symbol of freedom." *Id.* at TR I 51. He noted that the "Klan's use of the cross originated from the early Scottish Klans in Scotland in the 1300's which used the cross as a symbol to rally the clans together to fight against their English oppressors." *Id.* And, Mr. Carr elaborated that other special meanings of the cross include "as a symbol of freedom, as a symbol of trying to unite our people . . . as a symbol of freedom from tyranny. The cross was also incorporated in the Confederate battle flag. . . . " *Id.* at TR I 61.

Cantor Jack Chomsky of Tifereth Israel Congregation in Columbus, Ohio testified as an expert that the menorah permitted by the State of Ohio, like other Chanukah menorahs, "is a religious symbol. It is used in conjunction with fulfilling the obligations incumbent upon a Jew for the celebration of the festival of Chanukah." He also stated that he took "exception" to the State's contention that the menorah was a seasonal display and "not a religious symbol." Cantor Jack Chomsky at TR I 70-71. He added that Jews have an obligation to "put candles in it as appropriate, as prescribed by our tradition, and they recite blessings which state as part of the blessings that we were commanded to perform this act. Blessings such as this make this into very much a ritual act." *Id.* at 75-76.

The Decisions Below

The District Court found that the evidence established that the area in question had been used for many years by many groups to express many different ideas and for a variety of displays. A14 (844 F. Supp. at 1183-1184). The Court found that there was no policy against free-standing displays in Capitol Square and that for many years unattended displays have been placed on Capitol Square for limited periods including, during December, a free-standing Christmas tree and a free-standing menorah, the latter being a religious symbol, "a nine-branch candelabrum that serves as the primary symbol of the Jewish holiday of Hanukkah." *Id.* The Court observed that one of the Board's reasons for denying the Klan's application – the purported failure of the Klan to post a bond – was "not a proper ground for the denial of the permit . . . " and that the State "does not contend that the erection of a cross poses a security risk of any kind." A16 (844 F. Supp. at 1184). The Court concluded that "the State of Ohio is in no way associating itself with the Klan's display," that there was no appearance of endorsement of religion, and that "the reasonable observer should conclude that the government is expressing its toleration of religious and secular pluralism." The Court then held that "freedom of speech would be meaningless if it did not apply to all groups, popular and unpopular alike." A26 (844 F. Supp. at 1187-88).

The Court then granted the injunction requiring the State to approve a permit for the Klan to display a cross and statement through December 24, 1993. Following the judicial proceedings, there were barely two days left to

prepare and display the cross and its accompanying statement; the display was set in place in the early morning hours of December 22, 1993. RA24-RA30 (Plaintiff's Supplemental Exhibits 102 and 103; these same exhibits, as well as RA31 and RA32, indicate the subsequent history of this and other displays).

The Sixth Circuit affirmed on Free Speech, Free Exercise, and Equal Protection grounds. A6-A7, A11-A12 (30 F.3d at 677-78, 680). That Court rejected Petitioners' claim that there was any endorsement of religion by the State in this case. To the contrary, it asserted that, on the facts here, the State could not rely upon "the fanciful perceptions of some hypothetical dolt" that the Klan cross was endorsed by the State. A9 (30 F.3d at 679).

REASONS FOR DENYING THE WRIT

I. THE COURT BELOW APPLIED WELL-SETTLED LAW IN HOLDING THAT THE KU KLUX KLAN IS ENTITLED TO ACCESS TO A PUBLIC FORUM TO EXPRESS UNPOPULAR POLITICAL AND RELIGIOUS VIEWS ON THE SAME BASIS AS OTHERS WITH MORE POPULAR VIEWS.

The record and the decisions below make it clear that the denial of the permit to Respondents was discriminatory, based entirely on who they are and what they stand for.

In what is perhaps the greatest of understatements in this case, the Sixth Circuit pointed out that "there is no indication that Ohio treated the Klan or its display favorably." Indeed, the Court went on to identify the readily

apparent political discrimination against the Klan, noting that "Zealots have First Amendment rights too. Some speech may be distasteful, unpopular, and outright offensive. . . . " A11 (30 F.3d at 679). Applying the First *and* Fourteenth Amendments, the Circuit relied upon Justice Marshall's opinion in *Police Department of Chicago v. Mosley*:

> Necessarily, then, under the Equal Protection Clause, not to mention the First Amendment itself, government may not grant the use of a forum to people whose views it finds acceptable, but deny use to those wishing to express less favored or more controversial views. And it may not select which issues are worth discussing or debating in public facilities. There is an "equality of status in the field of ideas," and government must afford all points of view an equal opportunity to be heard. Once a forum is opened up to assembly or speaking by some groups, government may not prohibit others from assembling or speaking on the basis of what they intend to say. Selective exclusions from a public forum may not be based on content alone, and may not be justified by reference to content alone.

A11-A12 (30 F.3d at 680), quoting *Mosley*, 408 U.S. 92, 96 (1972) (footnote omitted by the Circuit).

The conclusion of the court below is supported by the pronouncements of this Court over more than half a century. It is abundantly clear that unpopular views cannot be the basis for denial of access to a traditional public forum.

Here, the Klansmen sought to place their symbol and political statement in what is unquestionably a public forum. As this Court has long recognized, such fora "have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions." *Hague v. CIO*, 307 U.S. 496, 515 (1939). Thus, "[g]overnment may not grant the use of a forum to people whose views it finds acceptable, but deny use to those wishing to express less favored or more controversial views." *Carey v. Brown*, 447 U.S. 455, 461-62 (1980). In the case at bar, the discrimination against Klan political and religious views is clearly content-based and is subject to the *Carey* principle that "[s]elective exclusions from a public forum may not be based on content alone, and may not be justified by reference to content alone." *Id.* at 462-463. Accord, *Mosley*, 408 U.S. at 96; *Texas v. Johnson*, 491 U.S. 397, 414 (1989).

In the case at bar, the only justification offered for the content discrimination is the Establishment Clause, but the State cannot plausibly rely on the Establishment Clause when it permits other religious displays. At a minimum, the Establishment Clause prohibits such religious favoritism.

This rule of nondiscrimination is well-settled law. In *Niemotko v. Maryland*, 340 U.S. 268 (1951), this Court unanimously held invalid a "practice" in which an administrator's standardless judgment was used as a device to prevent a group of Jehovah's Witnesses from holding a Bible study meeting in a public park. After finding that the license was denied because of the city council's disagreement with the views of the Witnesses,

the Court concluded: "The right to equal protection of the laws, in the exercise of those freedoms of speech and religion protected by the First and Fourteenth Amendments, has a firmer foundation than the whims or personal opinions of a local governing body." *Id.* at 671-72. Again, in *Fowler v. Rhode Island*, 345 U.S. 67 (1953), the Court reiterated that the First Amendment was violated when a Jehovah's Witness religious service was treated differently than those of Catholics or Protestants. *Id.* at 69-70.

Likewise, in *Larson v. Valente*, 456 U.S. 228 (1982), the Court was emphatic: "The clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another." *Id.* at 244. As the Court concluded in *County of Allegheny v. Greater Pittsburgh ACLU*, 492 U.S. 573 (1989), "[w]hatever else the Establishment Clause may mean . . . , it certainly means at the very least that government may not demonstrate a preference for one particular sect or creed. . . . " 492 U.S. at 605.

The District Court below found the Klan's cross to be a religious symbol, A25 (844 F. Supp. at 1187), just as this Court has held that "[t]he menorah, one must recognize, is a religious symbol." *Allegheny*, 492 U.S. at 613. To ban the former while permitting the latter, as the Petitioners seek to do, clearly "contradicts the fundamental premise of the Establishment Clause itself. The anti-discrimination principle inherent in the Establishment Clause necessarily means that would-be discriminators on the basis of religion cannot prevail." *Id.* at 611.

In this case, the State has committed two forms of constitutionally prohibited discrimination: first, it has discriminated among religions; second, it has treated Respondents' religious speech less favorably than other non-religious expression that it regularly permits in Capitol Square. The latter form of discrimination in a public forum is equally inconsistent with this Court's precedents. For example, in *Widmar v. Vincent*, 454 U.S. 263 (1981), the Court upheld the use for religious purposes of public university facilities that were otherwise available for use for secular gatherings.

Subsequently, the Court applied nondiscrimination to religious expression in a public school. *Board of Education of West Side Community Schools v. Mergens*, 496 U.S. 226 (1990). *Mergens* involved an Establishment Clause attack upon an act of Congress that required federally funded schools to allow religious groups to meet on school premises when schools permitted other non-school related groups to do so. In *Mergens*, the Court was dealing with a "limited open forum" not even the broader, quintessential forum that exists at the Ohio Capitol grounds.

Most recently, in *Lamb's Chapel v. Center Moriches Union Free School District*, 113 S.Ct. 2141 (1993) the Court again unanimously upheld the right of a church, deemed by the school to be "radical", to show a film espousing religious values, where the showing would have been after school, open to the public, and not sponsored by the school. *Id.* at 2143-44. Justice Kennedy noted "the unanimity of our conclusion that this overt, viewpoint-based discrimination contradicts the Free Speech Clause of the First Amendment. . . . " *Id.* at 2149 (Kennedy, J., concurring).

Here, the Klan's display (RA25, RA29), with its own statement and disclaimer,[12] stood within the vast public forum area: the cross was free-standing, not placed in the ground, not placed in any exalted position, was never alone on the square. It was much smaller than other items on Capitol Square (14-foot high menorah, RA23, with no disclaimer; 20-foot high Christmas tree, RA31, RA32, with no disclaimer). Given the total circumstances, it could not be conceived of as a State endorsement. Moreover, the cross did not appear elevated on any platform or stairway, it was not affixed to the side of any State building, nor was it erected on top of any State building. In short, as the District Court found, the Klan cross was part of a context of cultural diversity in a pluralistic society. A25 (844 F. Supp. at 1187).

The Capitol Square Board asserts that it is concerned about the appearance of governmental endorsement of the Klan cross and points to excerpts from *Allegheny*. Petition at 14-16. Is it the position of the State that the menorah displayed annually in Capitol Square and dedicated last year by the Governor[13] will not reasonably be understood to be State endorsement? Curiously, it is also the State's position that the Klan cross, with its attendant message, denounced by State officials, and erected after protracted litigation, is an endorsement by the State. Or, is it the position of the State that only speakers from

---

[12] Counsel for the Respondents invited the State to suggest any amendments to the disclaimer that the State believed to be necessary. A16, 844 F. Supp. at 1183-84.

[13] See RA23 (Governor dedicating menorah. Plaintiffs' Supplemental Exhibit No. 101).

minority faiths may display their religious symbols on the public forum near the State Capitol? If so, then we must rely upon demographic studies to establish who has the right of expression. Of course, within this context, Klan Christianity is certainly a minority faith.

In short, it is clear that the instant case is not an appropriate vehicle to resolve the issues presented by the Petition. Rather, it is a case in which undisputed facts led to the unremarkable legal conclusion that the government can neither favor some religious expressions over others nor discriminate against unpopular political views in a public forum. On that issue, the decisions below reflect well-settled law and do not merit Supreme Court review.

II. THERE IS NO CONFLICT AMONG THE CIRCUITS REGARDING DISCRIMINATION AGAINST CONTROVERSIAL PUBLIC STATEMENTS WHICH COMBINE RELIGIOUS AND POLITICAL VIEWS.

The distinguishing features of this case are that (a) the State has discriminated **among** religious symbols, and (b) the Klan's cross was political. That is very different from the cases upon which the State relies in suggesting a conflict between the Sixth and some other Circuits.

The Petitioners' contention (Petition, at 18) that the decision below is in conflict with the Fourth Circuit's decision in *Smith v. County of Albemarle*, 895 F.2d 953 (4th Cir. 1990), *cert. denied*, 111 S.Ct. 74 (1990), and with the Second Circuit, *Kaplan v. City of Burlington*, 891 F.2d 1024 (2d Cir. 1989), *cert. denied*, 496 U.S. 926 (1990), ignores

those critical facts. Both *Smith* and *Kaplan* involved solitary religious displays alone in the public forum, without other attendant symbols. In *Smith*, it was a creche, 895 F.2d at 955; in *Kaplan*, it was a menorah, 891 F.2d at 1026. In the instant case, the forum was open and traditionally used for a variety of unattended displays, both religious and secular.

Moreover, in the case at bar, the Respondents sought to make a political and religious statement. That was apparent from the sign accompanying the Klan cross. It states that 1) the "cross was erected by private individuals," 2) "without government support," 3) "for the purpose of expressing respect for the holiday season," 4) "to assert the right of all religious views to be expressed on an equal basis on public property." A15-A16 (844 F. Supp. at 1183-84). Notwithstanding the disclaimer, the State made every effort to ban the display because of official hostility to the message.

On the other hand, in *Smith v. County of Albemarle*, the stipulated facts were that in front of a county offices building there was a nativity scene which was associated with "[n]o other seasonal displays," had "no secular content," was lit up at night, and was in a prominent location. 895 F.2d at 955. The record in *Smith* therefore suggests that the State officials in that case were sympathetic to the religious views expressed by the display. On such facts, the Fourth Circuit viewed the matter as falling squarely within this Court's decision in *County of Allegheny v. ACLU*, 492 U.S. 573 (1989).

Likewise, in *Kaplan v. City of Burlington*, where the menorah was a solitary religious display, 891 F.2d at 1029,

the Second Circuit distinguished its facts from the facts in both *Allegheny* and *Widmar*. The *Kaplan* court noted that:

> the City, prior to the grant of the permits for the display of the menorah, had not created a forum in the City Hall Park open to the unattended, solitary display of religious symbols. Other than the menorah in question, no permits had been issued for the unattended display of any religious symbol in the park.

891 F.2d at 1029.

In the case at bar, it is uncontested that for many years, the State has granted permits for "a free-standing Hanukkah menorah, which is a nine-branch candelabrum that serves as the primary symbol of the Jewish holiday of Hanukkah." A14 (*Pinette*, 844 F. Supp at 1183). Moreover, the censorial motives of the Petitioners are clear on the record. In addition, in the case at bar, the message is political and religious, while in *Kaplan* the message was purely religious.

Accordingly, on the facts of this case, there is no conflict between the Sixth Circuit, on the one hand, and the Second and Fourth Circuits, on the other, save for dictum.

CONCLUSION

For the foregoing reasons, the petition for a writ of *certiorari* should be denied.

Respectfully submitted,

BENSON A. WOLMAN
Counsel of Record
DAVID GOLDBERGER
3600 Olentangy River Road
Building 501
Columbus, Ohio 43214-3913
(614) 459-4140

Attorneys for Respondents

Of Counsel

KEVIN FRANCIS O'NEILL
American Civil Liberties Union
of Ohio Foundation
1223 West Sixth Street
Cleveland, Ohio 44113
(216) 781-8639

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

Vincent J. Pinette, et al.,

Plaintiffs,

vs.

Capital Square review and Advisory Board, et al.,

Defendants.

Case No.
C2-93-1162
JUDGE GRAHAM

(Filed Jan. 4, 1994)

OPINION AND ORDER

On December 21, 1993, the Court issued an Opinion and Order adjudicating the claim set forth in Count One of the Plaintiffs' Amended Complaint. This matter is now before the Court for decision after a trial on the merits of the claims set forth in Counts Two, Three and Four of Plaintiffs' Amended Complaint. The Findings of Fact and Conclusions of Law contained in the Court's Opinion and Order of December 21, 1993 are incorporated herein by reference.

FINDINGS OF FACT

Defendants granted a permit to the plaintiffs to conduct a rally at the Ohio Statehouse on October 23, 1993. On October 26, 1993, defendants submitted a bill to the plaintiffs in the amount of $15,116.76 for expenses and losses incurred by the state as a result of that rally. On October 29, 1993, plaintiffs applied to defendants for a permit to hold a rally at the Statehouse on January 15, 1994 for the dual purpose of protesting the bill they received from the state for the October 23rd rally and

expressing their opposition to the designation of the birthday of Martin Luther King, Jr. as a state and national holiday.

On December 28, 1993, defendants denied plaintiffs' application for a rally on January 15, 1994 citing plaintiffs' failure to pay the October 26, 1993 bill, their unwillingness to comply with the bond requirements contained in the permit application and on the further grounds that the plaintiffs have "engaged in a pattern of harassment and intimidation based on the use of fighting words which creates a clear and present danger to public safety."

In Count Two of the Amended Complaint, plaintiffs seek an order requiring defendants to issue a permit for the January 15, 1994 rally. In Count Three, they seek a declaratory judgment invalidating the bill of October 26, 1993 and in Count Four they seek damages for the violation of their constitutional rights.

The October 23, 1993 rally was attended by about twenty-five members of the Klan and about one thousand protesters. Security for this event required extensive planning and coordination by state, county and city law enforcement agencies. A ten foot high chain link fence was erected in order to separate the Klan from the protesters. Walk-through and hand-held magnetometers were used to detect weapons. Approximately one hundred and thirty weapons were taken from spectators. The Statehouse underground parking garage was closed for security purposes. Major thoroughfares around the Statehouse were closed. Special transportation was arranged to take the Klan members to and from the Statehouse. Over four hundred law enforcement officers

were present. These measures were successful in preventing injury and property damage. The combined cost of all security measures is estimated to be something in excess of $100,000. The City of Columbus incurred overtime costs for police and fire personnel in the amount of $57,974.37.

The October 26, 1993 bill sent to the plaintiff consists of $1,243.50 in lost revenues from the underground parking garage; $9,179 for protective fencing and $4,694.26 for labor costs described as "planning, setup, teardown, materials and cleanup."

At the time of the October 23, 1993 rally, defendants had no rules or regulations for charging applicants for security costs incurred in connection with an event and there was nothing in the permit application which would alert an applicant to the possibility that such a charge would be levied after the event.

Ohio Administrative Code §128-4-03, which became effective on October 29, 1993, provides in part as follows:

> (D) In order to protect the condition of the capital buildings or grounds and ensure the safety of all persons, the board may require a cash bond of one thousand dollars or more to be provided by the permit holder if the event involves the use of equipment, structures, vehicles, banners or signs to be placed on or attached to the capitol buildings or grounds. In lieu of a bond, the permit holder may elect to obtain a letter of credit equal to the amount of the required bond. The bond or letter of credit shall indemnify the state of ohio [sic], against danger, or destruction to, or theft of state property arising in connection with or as a result of the activity of the organization, participants or

> spectators. Such bond or letter of credit will be refundable after the use if the organization has complied with all the terms and conditions of the permit.

Defendant has no other rules or regulations or established practice to determine whether a bond should be required for an event or the amount of such bond. It is not clear whether defendants applied Administrative Rule 128-4-03(D) to plaintiffs' application for the January 15, 1994 rally. That application was filed on the very day the rule became effective. There is no evidence that the board determined that a bond would be required for that event or what the amount of any such bond should be.

When plaintiffs made application for the October 23, 1993 rally, they struck out the paragraph of the application form pertaining to bonds and inserted the words "you can't put a price on free speech." Defendants waived the bond requirement for that permit. When plaintiffs completed the application for the January 15, 1994 rally, they crossed out the paragraph number next to the paragraph pertaining to bond requirements and wrote in the words "no price on free speech." Plaintiffs paid the $20 application fee. In the past, the defendants' practice with respect to bond requirements has been to either waive the bond requirement entirely or to require a bond between $50 and $200 based on the judgment of the permit clerk. Plaintiffs were never notified that a bond was required for the January 15, 1994 rally.

The Klan members who participated in the October 23, 1993 rally conducted themselves in a peaceful and orderly manner. They were searched prior to the event and no weapons were found. The Klan protesters were unruly and threatening in their demeanor and actions.

The security measures planned for the event were in response to the anticipated violent reaction of the Klan protesters. There was no expectation that the Klan itself would engage in violence. The expenses which were billed to the plaintiffs on October 26, 1993 were not necessitated by the plaintiffs' anticipated or actual actions but were necessitated instead by the anticipated and actual actions of the Klan protesters.

At the October 26, 1993 rally, the Klan members made speeches and played audio tapes. They spoke against affirmative action, integrated schools and interracial marriage. They spoke against Jews, African-Americans and homosexuals and advocated the supremacy of the Caucasian race. They sometimes made a fascist salute and sometimes chanted "White pride" and "White power." They encouraged their adherents to arm themselves and to use all means necessary to accomplish their goals. The Klan protesters chanted "Go home Klan" and "Death, Death, Death to the Klan" and attempted to push through the protective fencing.

The Mayor of the City of Columbus and the Governor of the State of Ohio have publicly expressed their opposition to the granting of a permit for the January 15, 1994 rally. The Mayor testified about his concern for the cost of police protection and its impact on the city's already limited budget for public safety services. The Mayor and Captain Reel of the Ohio State Highway Patrol are concerned about the increased potential for violence at a rally to be held on Martin Luther King, Jr.'s birthday. However, the state has not shown that it is unable to provide adequate security for the kind of rally plaintiffs plan to hold on January 15, 1994.

CONCLUSIONS OF LAW

In its letter of December 28, 1993 denying plaintiffs' application for the January 15, 1994 rally, the defendants have cited the Administrative Appeal provisions of Chapter 119 of the Ohio Revised Code and Rule 128-4-04 of the Ohio Administrative Code. By delaying action on plaintiffs' permit until December 28, 1993, defendants have foreclosed any possibility of a timely administrative appeal from the denial of the permit. In opposing plaintiffs' request for injunctive relief, defendants have not raised any issues relating to exhaustion, finality or abstention and they have waived any such defenses or objections.

The Ohio Statehouse grounds are the archetypal public forum. They have been used from time immemorial for all manner of public gatherings and demonstrations by groups of all kinds, including political parties, charitable and religious groups, labor unions, civil rights groups and the proponents and opponents of all manner of social and political issues.

In *Cox v. New Hampshire*, 312 U.S. 569 (1941), the Supreme Court held that the First Amendment was not violated by a city ordinance which assessed a fee for conducting a parade on the city streets. The Court ruled that such a permit fee may take into consideration the expense of maintaining public order and that it may vary in proportion to the requirements of the event. *Id.* at 576-77. *See also Stonewall Union v. City of Columbus*, 931 F.2d 1130 (6th Cir.), *cert. denied*, ___ U.S. ___, 112 S.Ct. 275 (1991). However, a permit scheme may not delegate overly broad discretion to a government official, the fee may not be based on the content of the message, and any

restrictions on speech or expression must be narrowly tailored to serve a significant governmental interest and must leave open ample alternatives for communication. *Forsyth County v. Nationalist Movement*, ___ U.S. ___, 112 S.Ct. 2395, 2401 (1992). Defendants' scheme for requiring and setting the amount of bonds for permits vests the Capitol Square Review and Advisory Board with unbridled discretion and is facially unconstitutional. *Id.* Defendants may not properly deny plaintiffs' application for the January 15, 1994 rally for its refusal to comply with an unconstitutional bond requirement.

A permit scheme which imposes on the speaker costs which are associated with the listeners reaction to the speech is not content neutral. "Speech cannot be financially burdened any more than it can be punished or banned, simply because it might offend a hostile mob." *Forsyth County*, 112 S.Ct. at 2404 (citing *Gooding v. Wilson*, 405 U.S. 518 (1972); *Terminiello v. Chicago*, 377 U.S. 1 (1949)) (footnote omitted). "A State may not impose a charge for the enjoyment of a right guaranteed by the Federal Constitution." *Central Florida Nuclear Freeze Campaign v. Walsh*, 774 F.2d 1515, 1522 (1985). Defendants' attempt to charge plaintiffs for the costs of security measures necessitated by the anticipated reaction to their speech is a violation of their First Amendment rights and the state's bill of October 26, 1993 is void and unenforceable. It follows that defendants' denial of a permit for the January 15, 1994 rally on the grounds that plaintiffs have failed to pay the October 26, 1993 bill is likewise unconstitutional.

The First Amendment generally prevents the government from prohibiting speech because it disapproves of the ideas expressed. *Cantwell v. Connecticut*, 310 U.S. 296

(1940); *Texas v. Johnson*, 491 U.S. 397 (1989); *Simon and Schuster, Inc. v. Members of the New York State Crime Victims Bd.*, ___ U.S. ___, 112 S.Ct. 501 (1991). However, constitutional jurisprudence has always recognized certain limited exceptions to this rule. The Constitution does not protect obscenity, defamation or fighting words. Fighting words are a direct personal insult or invitation to exchange fisticuffs. *Texas v. Johnson, supra,* at 409. They are not a means of exchanging views, rallying supporters or registering a protest, but are words directed against individuals to provoke violence or to inflict injury. *Chaplinsky v. New Hampshire,* 315 U.S. 568, 572 (1941).

The fighting words exception has always been narrowly construed. *R.A.V. v. St. Paul,* ___ U.S. ___, 112 S.Ct. 2538, 2567 (1992). "The mere fact that expressive activity causes hurt feelings, offense, or resentment does not render the expression unprotected." *Id.* at 2559. Plaintiffs' message and their methods of expression are deeply offensive to many, however, they are not fighting words in the constitutional sense. As Justice White noted in his concurring opinion in *R.A.V. v. St. Paul,* even "[b]urnng a cross at a political rally would almost certainly be protected expression. *Cf. Brandenburg v. Ohio,* 395 U.S. 444, 445, 89 S.Ct. 1827, 1828, 23 L.Ed.2d 430 (1969)." *R.A.V. v. St. Paul,* 112 S.Ct. at 2553 n.4.

Defendants have failed to show that plaintiffs have engaged in or that they are likely to engage in speech or expression which falls within the narrow definition of fighting words. The evidence does not support defendants' assertion that plaintiffs have engaged in a pattern of harassment and intimidation based on the use of fighting words and this groundless assertion is not a proper

ground for defendants' denial of plaintiffs' application for a permit to hold a rally on January 15, 1994.

In some circumstances the threat of violence may provide a sufficiently compelling state interest to justify restrictions on speech. *See Christian Knights of the Ku Klux Klan Invisible Empire, Inc. v. District of Columbia,* 972 F.2d 365 (D.C. Cir. 1992). Here, defendants have not sought to impose any restrictions on the time, place or manner of plaintiffs' speech but have instead denied their permit application entirely leaving open no alternatives for communication of the two messages they wish to express.

Plaintiffs seek an award of damages in the amount of $1,000 "for their expenditures and added time and attention necessary to secure their rights." Plaintiffs have produced no evidence of actual damages. The Capitol Square Review and Advisory Board is an arm of the State of Ohio and would be immune to liability for damages under the Eleventh Amendment. The plaintiffs have failed to show that defendants Keller, Shellenbarger and Finan who have been sued in their individual, as well as their official capacities, had any personal responsibility for the actions of which plaintiffs complain. Thus plaintiffs have failed to prove that they are liable for damages in their individual capacities. Defendants are entitled to judgment in their favor on plaintiffs' claim for monetary damages.

CONCLUSION

Thirty years ago the Reverend Dr. Martin Luther King, Jr. confronted hostile and unruly crowds in many southern cities. If the state had been free to impose the cost of security measures on him and his followers the Civil Rights movement of the 60's might have died in its

infancy. In order to insure freedom of speech, we must tolerate the free expression of ideas with which we disagree. And our response to that speech, no matter how pernicious, ought to reflect the beliefs of Dr. Martin King:

> I am convinced that if we succumb to the temptation to use violence in our struggle for freedom, unborn generations will be the recipients of a long and desolate night of bitterness, and our chief legacy to them will be a neverending reign of chaos.

Defendants are ordered to grant a permit to the plaintiffs for a rally at the Statehouse on January 15, 1994. The Court hereby declares that the state's October 26, 1993 bill to the plaintiffs for expenses and losses incurred in connection with plaintiffs' October 23, 1993 rally is void and unenforceable. Plaintiffs' claim for money damages is dismissed with prejudice. The costs of this action are assessed against the defendants.

It is so ORDERED.

/s/ James L. Graham
JAMES L. GRAHAM
United States District Judge

DATE: January 4, 1994

PLAINTIFFS' EXHIBIT 33
TRANSCRIPT OF BROADCASTS BY
OHIO PUBLIC RADIO

Broadcast #5, November 18, 1993

Cohen: Officials in charge of the Capitol grounds say that they hate the Klan but there is nothing they can do to block the KKK in going ahead with plans to hold a January 15th rally protesting the Martin Luther King Holiday.

Finan: It's called the First Amendment rights of the United States Constitution.

Cohen: That is State Senator Richard Finan, head of the agency that controls the Statehouse grounds. After the KKK held a Statehouse rally in October which featured 500 police and highway patrol officers holding back a thousand anti-Klan protestors, officials sent the Klan several bills to pay for the extraordinary protection. They totalled more than a hundred thousand dollars. Klan leaders refused to pay and for a while state officials declared that meant the Klan would never get the okay to hold a second rally. Now, though, after meeting with their lawyer, officials, like Finan, are conceding they do not have court precedence on their side.

Finan: We would love to have a basis for denying the Klan the right to come here. We explored ideas of they didn't pay the bill. Does that give us any defense? Bottom line answer is "no."

Cohen: Reaction to the decision is fairly predictable. Ohio Klan leader Vince Pinette from Cleveland said he is delighted but not surprised.

Pinette: We knew that standing on that First Amendment, God given, inalienable, constitutional rights, that there would be no way they could put a price tag on free speech.

Cohen: And, on the other side, critics of the Klan are upset. Keith Gilty, who is an OSU professor, who helped organize the last protest against the Klan.

Gilty: I'm disappointed that the State is going to allow a group that advocates genocide to have public rallies on its grounds. If the Klan happened to be a group of so-called Palestinian terrorists or something of that sort, there's no way they would ever be granted a permit to speak in public. The problem here is that apparently Ohio state officials are not willing to acknowledge what the Klan really is.

Cohen: There is an ironic twist in this story. At the same time state officials were giving the green light to the Klan, they put up a red light to the traditional official state holiday tree and an unofficial Hanukkah menorah, both of which have graced the statehouse grounds for years. Senator Finan said he wanted to avoid having Columbus go through what Cincinnati went through last year and may go through again this year. Last holiday season, after a tree and menorah were put up in a public square in the queen city, the Klan went to court for ruling to allow them to erect a 15-foot tall cross. Vandals kept knocking it down so city officials were later ordered to provide special police protection at the Klan project. Senator Finan says this year no holiday symbols will be allowed at the Statehouse, and, that way, the Klan won't get its symbol in the door either. May seem strange that the Klan is

being allowed to hold a second rally while mainstream religious symbols are barred. Finan says the two situations are very different.

Finan: We could keep the Ku Klux Klan off the Statehouse grounds, all we have to do is bar everybody else. We're not prepared to do that. It's a little easier to bar a holiday tree than it is to bar everybody from the Statehouse.

Broadcast #6, November 19, 1993

Cohen: It was a dream come true for radio deejays and talk show hosts. An explosive issue every John and Joan Q. Public would want to gab about and offer their own views on. Capitol grounds managers announced that to prevent legal hassles over religious symbols in government buildings, they were barring the traditional holiday tree and Hanukkah menorah from the Statehouse. Media masters instantly hyped up the issue asking listeners to call in with their reactions. Some called the stations to protest on the air; others called state officials directly. The Governor's switchboard lit up like, you guessed it, a Christmas tree.

Governor's Secretary: Governor's Office . . . Oh, yes . . . You think it's terrible, well we do also . . . Yes, I agree with you and you think if we keep on we'll be eliminating Christianity and everything else . . . Yes, well I'll certainly pass that onto the Governor. We thank you for calling.

Cohen: One Columbus radio station took an informal poll of listeners. Ninety-one percent declared the State to

be the worst Scrooge in the world to ban the holiday symbols. Within hours Governor Voinovich and legislative leaders put together a letter to the Capitol Square Review and Advisory Board; the folks who voted for the ban. Not too subtle message. Call another meeting and reverse your ruling. Mike Dawson is a spokesman for the Governor.

Dawson: People of this great State think that we ought to have a Christmas tree and think that we ought to have a menorah at the Statehouse and so do we. We've had a Christmas tree at the Statehouse for tens of years and you can't let a single group or groups of people dictate to the people of Ohio what they are and aren't going to do.

Cohen: The Governor and legislative leaders don't agree with the Chairman of the Statehouse grounds agency. Senator Richard Finan had explained there was good reason for banning the mainstream religious symbols. He wanted to avoid the Statehouse to go through what Cincinnati went through last year. There, after a tree and menorah went up on Fountain Square, the Ku Klux Klan demanded and got the right to erect their own symbol – a 15-foot tall cross. Special police protection was eventually brought in to protect the cross from protestors who kept knocking it down. And in the end the taxpayers were the losers. Despite some fears that the Capitol may have to go through that same kind of hassle, Tuesday afternoon the Governor and legislative leaders may get their way. The Capitol Square Review Board has agreed to hold another session and, with three members present who were absent last time around, the board may reverse its original ruling. That could spark more disputes though, as the Board's spokesman Dan Shellenbarger notes, the Klan

might use the presence of a tree and menorah as the foot in the door to demand the giant cross.

Shellenbarger: In their other news releases that they have sent out, they said that they're out to embarrass Columbus, Ohio. We just figure we're under intense scrutiny.

Cohen: The squabble over the holiday tree and menorah has sparked national publicity. That's because the closing of the door on the holiday symbols happened the same day the Statehouse grounds opened the door to the Ku Klux Klan to hold another controversial rally at the Statehouse January 15th.

Broadcast #8, November 23, 1993

Cohen: With legislative leaders casting votes for the first time in this dispute, Capitol Square Review and Advisory Board has done a turnaround. That means the official state holiday tree and an unofficial giant Hanukkah menorah will be welcome at the Statehouse after all. Last week with three members absent, the Board had voted to bar all holiday decorations. Chair Richard Finan reasoned that closing the door on the tree and menorah would also close the door on possible plans by the Ku Klux Klan to demand the State erect a giant Klan cross as part of the Capitol display. That decision sparked dozens of phone calls from angry citizens and a terse letter from legislative leaders and the Governor. That's why the decorations ban lasted less than a week. Even Finan himself voted to drop the ban.

Finan: I've been in politics for twenty one years. When you get a letter from the Governor, the Speaker, and the President of the Senate, you do respond.

Cohen: Finan said public outrage and pressure from the Governor wasn't the only factor. He said lawyers from Ohio's Attorney General's office advised that keeping the decorations banned could cause serious constitutional questions, but pressed to explain further, Finan refused.

Finan: I think that's all speculation, Bill; I think in the instance that we're in, we have to choose our words very carefully as to what we do and what we say.

Cohen: While Finan wouldn't discuss the legal arguments, a top legal advisor to the Attorney General did. Richard Cordray explained that banning the holiday tree and menorah could be considered a violation of citizens' free speech rights and he hinted that someone could file a court suit over it.

Cordray: In Ohio, the tradition has been that we permit holiday season displays on the Capitol Square, and, under the First Amendment, if the government establishes a tradition of permitting people to speak in a certain way, then to revoke that permission, and to stop a tradition without a compelling reason, involves you in a possible violation of the First Amendment, and no one wanted a constitutional violation here which could cost the taxpayers a lot of money.

Cohen: While the Statehouse grounds agency decided the decorations issue, another continued to simmer. The Board recently declared it could find no legal basis for blocking the Ku Klux Klan holding another Statehouse

rally in January, even though the group refused to pay more than a hundred thousand dollars in security expenses from its October rally. That ruling brought a protest from State Representative Otto Beatty who said courts have ruled it's okay to balance people's free speech rights with public safety concerns.

Beatty: We're talking about the kind of hate and rhetoric that we saw when they were down here before. That is enough to incite feelings of ill will, feelings of hate, and perhaps cause physical confrontations between people. So with that kind of balancing act I think that they have the legal right to at least consider not issuing the permit.

Cohen: The Klan rally is scheduled for January 15th, Martin Luther King's birthday.

DEFENDANTS' EXHIBIT C

[*Reproduced from Newspaper Article*]

The Columbus Dispatch
Thursday, November 20, 1993

Klan leader says group will seek to erect cross

By Alan Johnson
Dispatch Statehouse Reporter

The Ku Klux Klan had no plans to place a Klan cross at the Statehouse – until recent action by the Capitol Square Review and Advisory Board.

The board on Tuesday agreed to allow a Christmas tree and Menorah holiday display at the Statehouse, less than a week after refusing them.

Vince Pinette, grand titan of the Knights of the Ku Klux Klan, said the group now plans to seek permission to place a cross at the Statehouse.

The initial ban on holiday displays, Pinette said, "to us was almost an attack on Christianity and that kind of offended us.

"The Klan doesn't have a problem with a Christmas tree," he said. "But we feel if the Jews are going to have a menorah, we should put up a symbol for our lord, Jesus Christ."

Board officials said they have not received a Klan request for a display.

A Klan cross displayed on Fountain Square in Cincinnati last year sparked violence and vandalism. Because of that, the board initially banned the Christmas tree and menorah so it also could ban a Klan cross and avoid security problems.

Pinette, a Cleveland tool and die worker, said the Klan has applied for – and is confident it will get – a permit for a Statehouse rally on Jan. 15, two days before Martin Luther King Jr. Day. He said the Klan will not ask for security and he is not worried about violence.

DEFENDANTS' EXHIBIT D

[Reproduced from Newspaper Article]

The Columbus Dispatch
Saturday, November 20, 1993, Page A1

HOLIDAY DISPLAY DISPUTE

Statehouse may yet see Christmas tree, menorah

By Alan Johnson
Dispatch Statehouse Reporter

A Christmas tree and a menorah – but not a Ku Klux Klan cross – may go up at the Statehouse after all.

The Capitol Square Review and Advisory Board, pummeled by criticism and pressured by the governor and the legislature's four leaders, will meet Tuesday to reconsider whether to allow the traditional Christmas tree and a menorah on the Statehouse grounds.

The board, which oversees the Statehouse, Senate Building and grounds, voted 4-2 Thursday to ban the tree and menorah. It was concerned that allowing such symbols would prompt groups such as the Ku Klux Klan to erect displays.

The board was asked yesterday to reconsider. The request came from Gov. George V. Voinovich; House Speaker Vernal G. Riffe Jr., D-Wheelersburg; Senate President Stanley J. Aronoff, R-Cincinnati; House Minority Leader Jo Ann Davidson, R-Reynoldsburg; and Senate Minority Leader Robert J. Boggs, D-Jefferson.

There appears to be little doubt the vote will be reversed. Riffe, Davidson and Boggs are board members but did not vote Thursday for various reasons.

"While we recognize the board's concerns, we strongly believe the tree and the menorah should be displayed as they have been in the past," the officials said in a letter they all signed.

"The board's initial decision to not have the traditional holiday displays was a mistake. I trust this matter will be resolved quickly," Voinovich said in a statement.

The governor was reported to be "disappointed and upset" when he learned about the decision. He was attending a Republican Governors' Association conference in Phoenix, Ariz.

If the board reverses itself, the Christmas tree will go up, as planned, inside the atrium connecting the Statehouse and Senate Building. A tree lighting had been scheduled for Dec. 7.

The menorah has been raised on the Statehouse lawn since 1987 in celebration of Hanukkah, which this year begins Dec. 9.

"We are taking the governor's comments very seriously," said Dan Schellenbarger, the board's spokesman. "The board is reconvening in light of those comments and the overwhelming public response about the decision. We've received hundreds of calls from people opposing the board's decision. I don't know of anybody who supported it."

Shellenbarger said he expects the board to allow the Christmas tree and menorah by defining them as secular

holiday symbols. A cross from the KKK or any organization could be seen as a religious symbol that violates the constitutional separation of church and state.

Grand Titan Vince Pinette of the Ohio Knights of the Ku Klux Klan was out of town yesterday and could not be reached for comment, his wife said.

A federal court ruling last year permitted the Klan to erect a cross on Fountain Square in Cincinnati during the holiday season. The cross brought protests and vandalism.

Word of the possible state reversal on the holiday tree was good news to Rolland Allman of Grove City, who had donated a 25-year-old, 20-foot blue spruce from his yard for use at the Statehouse.

"It was something I wanted to them [sic] have." Allman said. "It's getting kind of big for the front yard.

"I hope they go ahead with it."

Asked about the KKK and constitutional issues, Allman said, "I'm not worried about it."

The American Civil Liberties Union has no problems with the holiday religious displays as long as the church-state separation is respected, said Susan Rusnak of the ACLU in Cleveland.

Rusnak said a 1989 U.S. Supreme Court decision in a Pittsburgh case found that a Christmas tree and menorah display at city-county building represented the winter holiday season, "which has attained a secular status in our society."

But a cross, Rusnak said, "is unequivocally an institution of the Christian faith. There's no mistaking when you see a cross."

Rusnak said that if the matter comes down to a question of freedom of expression, "the ACLU would favor more freedom of expression. If the Capitol grounds would have a Christmas tree, a menorah and a cross, that would be a victory for freedom of expression."

FIRST CANDLE IS LIGHTED

Tim Revell/ *Dispatch*

Gov. George V. Voinovich lights the menorah at the Statehouse with help from several children. David Schottenstein, 10, had the honor of flipping the switch at yesterday's ceremony. The Jewish celebration of Hanukkah began at sundown.

PLAINTIFFS' SUPPLEMENTAL EXHIBIT 102

[*Reproduced from Newspaper Article*]

The Columbus Dispatch
Thursday, December 23, 1993, Page A1

More crosses going up

Church groups plan to overwhelm Klan display
By Sylvia Brooks
and Randall Edwards
Dispatch Staff Reporters

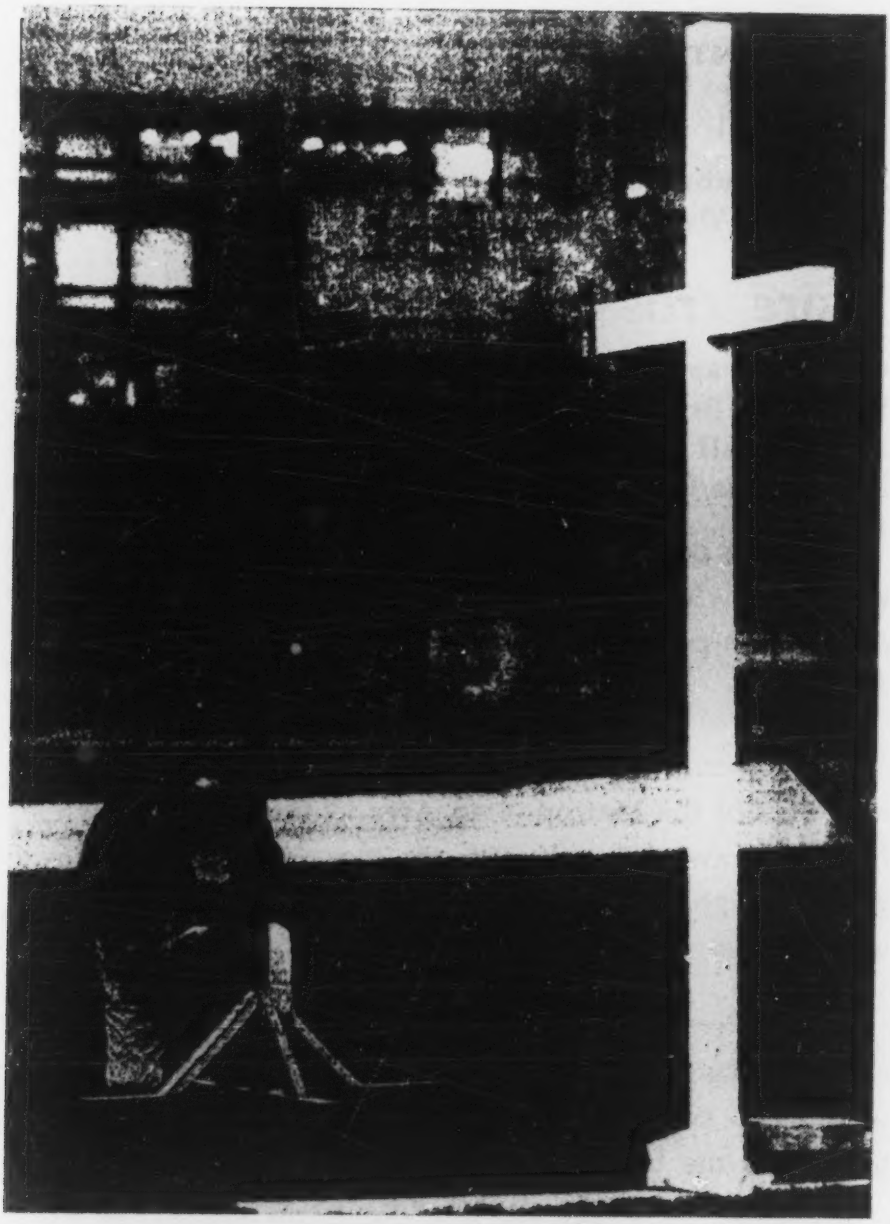
Dozens of crosses made by local churches may spring up on the Statehouse lawn after the state yesterday approved a permit for members of a local church organization.

The permit was sought by staff and some board members of the Metropolitan Area Church Council, who hope to draw attention from the cross erected yesterday by the Knights of the Ku Klux Klan by overwhelming it with crosses from churches.

Protesters battered the Klan cross – at one point last night stuffing it upside down into a Statehouse lawn trash can – while lawyers continued a legal battle likely to lead to the U.S. Supreme Court.

Burton Cantrell, an administrator of the council, said all churches in the Columbus area will be invited to erect crosses to "overcome the Klan with our good will at the Christmas season."

RA25



Tim Revell/*Dispatch*

Roger Evans prays at the cross he set up near the Ku Klux Klan cross on the Statehouse lawn. Evans is with the Southside Mission Project. Other churches and organizations also may erect crosses.

The Capitol Square Review and Advisory Board granted a blanket permission for all churches friendly to or affiliated with the church council to erect crosses.

Ron Keller, executive directed of the state board, said the state approved the permit in response to a federal court order.

The Rev. Tom York of the Broad Street Presbyterian Church and the Rev. Ross Crabtree of Boulevard Presbyterian Church say they will erect crosses, too.

Officials of the United Methodist Church were calling 120 churches around Columbus asking them to participate, said Karen Shepler, director of Urban Ministries for the West Ohio Conference of the United Methodist Church.

The permit for the churches runs through Dec. 27. The Klan permit runs through Christmas Eve, says a federal judge's order.

Klan members who erected the cross said they were being unfairly attacked by the state.

"We feel this is a shame. We want *our* freedom of expression, and we want to bring a message of hope," said Vince Pinette, who is known as the "grand titan" of the Knights of the Ku Klux Klan in Ohio.

"We are not a hate organization. Other minorities have organizations which represent them. This is the only organization in America that represents white people."

The debate has turned to a Klan rally planned next month on the Martin Luther King holiday. "I'm asking all of the people to come out on Jan. 15 and speak against

hatred," said Harry Edney, a spokesman for the Ordinary People's Movement, a Columbus-based group that organized a protest against the Klan's October rally.

The January rally was proposed after state official sent the Klan a $15,000 bill to cover the costs of protective fencing and other security measures at the Oct. 21 rally at the Statehouse.

Klan organizers said they would not pay the bill and would retaliate by scheduling another rally on the King holiday.

When state officials did not issue a permit for the January rally and denied the cross permit, the Klan filed suit in U.S. District Court in Columbus, saying its constitutional rights of free expression and assembly had been harmed.

Judge James L. Graham ruled Tuesday that the state must allow the cross because it was privately funded and was in a traditional "public forum." The order was upheld by the 6th U.S. Circuit Court in Cincinnati. Richard Cordray of Ohio Attorney General Lee Fisher's office said he would appeal to the U.S. Supreme Court.

Graham set a Jan. 3 date to hear arguments on the other issues in the lawsuit.

PLAINTIFFS' SUPPLEMENTAL EXHIBIT 103

[Reproduced from Newspaper Article]

The [Akron] Beacon Journal
Thursday, December 23, 1993, Page B5

Klan cross goes up, down

• Opponents topple Statehouse display three times, Churches' crosses take its place

Associated Press

COLUMBUS: A Ku Klux Klan cross erected outside the Statehouse took a beating from Klan opponents and finally was removed Wednesday. Later, crosses from church groups took its place on the Capitol lawn.

A man was seen taking the Klan's cross Wednesday night. The State Highway Patrol referred calls to a spokesman, who was unavailable.

The Metropolitan Area Church Council placed seven crosses where the wooden Klan cross had stood on the southwest corner of the Statehouse lawn. The Capitol Square Review and Advisory Board granted the council a permit Wednesday.

"Our secret desire is to make the Klan cross less significant by surrounding it with dozens of identical crosses," said the Rev. Burton Cantrell, council director. "We're saying to the Klan, you don't speak for Ohio, you don't speak for Columbus."

Associated Press

Opponents and supporters of the Ku Klux Klan's cross struggle against each other at the Statehouse on Wednesday. Said one opponent, "We're saying to the Klan, you don't speak for Ohio, you don't speak for Columbus."

In Cincinnati, where a different Klan group put up a cross on Fountain Square early Monday, the day passed without incident.

This is the third year for a Klan cross in Cincinnati. Ten people were cited for toppling last year's, but this one has been mostly ignored.

Cantrell paid a $20 permit fee and agreed to post a $225 bond if Statehouse property is damaged.

State officials, whose effort to block the Klan cross was overturned Tuesday by a federal judge, cited the decision in granting the church council's permit.

The 10-foot Klan cross was erected about 12:30 a.m. Wednesday. It was toppled by Klan foes three times by noon.

RA31

PLAINTIFFS'
SUPPLEMENTAL
EXHIBIT 105

Society Bank
Society
BANK ONE
PLAINTIFFS'
SUPPLEMENTAL
EXHIBIT 106